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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

ANTHONY T. EASTON)

WT Docket No. 97-199

To: The Commission

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REPLY TO WIRELESS TELECOMMUNICATIONS BUREAU'S
OPPOSITION TO PETITION FOR RECONSIDERATION

Anthony T. Easton, by his attorneys, and pursuant to section 1.106(h) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(h), hereby replies to the Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration ("Opposition") filed with respect to the Commission's *Memorandum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause*, FCC 97-322 (Sept. 9, 1997) ("Order") in this proceeding.

1. Once it departs from its authorized procedures, the Commission's actions often border on the inexplicable. Such is the case here, as evidenced by the Bureau's inability to rationalize the Commission's shoddy treatment of Mr. Easton.

2. The Bureau makes a perfunctory argument that Mr. Easton's petition for reconsideration is procedurally barred by section 1.106(a)(1) of the Rules. See Opposition at 3. However, the Commission has the discretion to entertain Mr. Easton's petition. Moreover, it often declines to dismiss petitions for reconsideration on procedural grounds. See, e.g., *New York Telephone Co.*, 6 FCC Rcd 3303, 3304 (1991), *aff'd*, *New York State Department of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993). The case law shows that section 1.106(a) is not enforced in "unusual circumstances", *Houston Mobilfone, Inc.*, 33 Rad. Reg. 2d (P&F) 1015, 1018 (1975), where "the

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public interest considerations . . . far outweigh consideration of administrative orderliness", *Southwest Broadcasting Co., Inc.*, 18 FCC 2d 858, 859 (1969). ^{1/}

3. The purpose of section 1.106(a)(1) would not be served by dismissing Mr. Easton's petition. The rule was among the summary decision procedures adopted to "simplify and expedite hearing proceedings." See *Cosmopolitan Enterprises, Inc.*, 50 FCC 2d 308, 308 (1974). Assuming that section 1.106(a)(1) applies, but see Petition for Reconsideration at 8-9, the enforcement of the rule in this case would not simplify or expedite anything. In fact, the dismissal of Mr. Easton's petition would not serve any useful purpose now that Judge Steinberg has certified the matter back to the Commission. See *Westel Samoa, Inc.*, FCC 97M-172, at 2 (Oct. 20, 1997).

4. The Commission must "determine on the basis of all information available from any source" whether it should issue (a) an order barring Mr. Easton from being a licensee or (b) an order "dismissing the proceeding". 47 C.F.R. § 1.92(d). Thus, it appears that the Commission has the obligation to consider the substantive arguments presented in Mr. Easton's petition. Regardless,

^{1/} The Bureau tries to distinguish the facts of those cases in which the Commission has reconsidered hearing designation orders. See Opposition at 3 n.4. That was a meaningless exercise. The Bureau had to "do more than enumerate factual differences"; it had to "explain the relevance of those differences". *Melody Music, Inc. v. FCC*, 345 F.2d 730, 731 (D.C. Cir. 1965). All the Bureau did was to enumerate differences. By doing so, the Bureau also showed that there was no factual similarity between the cases in which the Commission *did* reconsider designation orders. The Commission apparently uses a "we-know-it-when-we-see-it" standard in such cases.

the Bureau plans on filing comments on Judge Steinberg's certification order (even though no rule permits such a filing). See Opposition at 2 n.2. Mr. Easton presumably could resubmit his arguments as "comments", but that would be wasteful of his resources and those of the Commission. Under these circumstances, it would be pointless to dismiss his petition for reconsideration.

5. The Bureau's main procedural claim is that Mr. Easton waived his due process rights by not filing a petition for reconsideration of the notice of apparent liability issued to PCS 2000 L.P. ("PCS 2000") in *PCS 2000, L.P.*, 12 FCC Rcd 1703 (1997) ("*PCS 2000 NAL*"). See Opposition at 4-5. However, a waiver of a fundamental right must be "knowing and voluntary". *Doe v. Marsh*, 105 F.3d 106, 111 (2nd Cir. 1997). The facts will not support a finding that Mr. Easton knowingly and voluntarily waived his due process right to a hearing.

6. Mr. Easton certainly did not know that he was "required" to petition for reconsideration of the *PCS 2000 NAL*. Opposition at 5. The Bureau admits that petitions for reconsideration of notices of apparent liability "do not ordinarily lie". *Id.* at 4. Indeed, the Bureau claims that section 1.106 only allows petitions for reconsideration "of *final* Commission rulings". *Id.* at 3 (emphasis original). Clearly, the *PCS 2000 NAL* was not a final ruling.

7. Unlike this case, Mr. Easton was not a party to the "forfeiture proceeding" initiated by the Commission. 47 C.F.R. § 1.80(e). Only PCS 2000 had the right to respond to the notice of apparent liability. See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R.

§ 1.80(f)(3). Mr. Easton was aware of no rule or precedent that would authorize a third party to file a petition for reconsideration of an order initiating a forfeiture proceeding.

8. The Bureau's waiver argument ignores the reality of the situation that Mr. Easton faced once the *PCS 2000 NAL* was issued. The forfeiture proceeding effectively terminated three business days after the *PCS 2000 NAL* was released, when PCS 2000 paid the \$1 million forfeiture in full.^{2/} Consequently, the *PCS 2000 NAL* had arguably ripened into a final forfeiture order before Mr. Easton had time to act. In any event, Mr. Easton reasonably believed that he would be given a better opportunity to challenge the Commission's "conclusion" that he engaged in intentional misconduct.

9. The Commission explicitly stated in its *PCS 2000 NAL* that it would address the issue of Mr. Easton's fitness to be a licensee in a "subsequent order". 12 FCC Rcd at 1717. Mr. Easton was entitled to wait until that promised order was released to assess his rights. It was not unreasonable for him to assume that he would be afforded a fair opportunity to clear his name in a subsequent proceeding. That being the case, the Commission cannot conclude that Mr. Easton knowingly and voluntarily waived his rights by not

^{2/} See *infra* Attachment A (Letter of R. Michael Senkowski to Thomas Gutierrez (Feb. 25, 1997)). PCS 2000 offered to make a \$1 million "payment" at a meeting at the Commission on February 20, 1996. See Reply to Opposition to Petition to Deny and for Injunctive Relief, File No. 00414-CW-L-96, Ex. 1 at 1 (Sept. 13, 1996). That may explain why the Commission imposed a "forfeiture of \$1,000,000, as opposed to a \$3,000,000 forfeiture." *PCS 2000 NAL*, 12 FCC Rcd at 1718. It could also explain how PCS 2000 paid the forfeiture so promptly.

intervening in the forfeiture proceeding against PCS 2000.

10. The Bureau now suggests that the Commission (a) has jurisdiction over Mr. Easton because he holds an amateur operator's license, and (b) may "clarify" whether that license is "directly at issue in this proceeding". Opposition at 5 & n.11. The fact that Commission may have jurisdiction to revoke Mr. Easton's amateur license under section 312(a) of the Communications Act of 1934 ("Act") does not mean it has jurisdiction to issue a show cause order under section 312(b) of the Act for conduct unrelated to that license. If it wants to exercise its authority under section 312(a), the Commission must serve Mr. Easton with an order to show cause why his amateur license should not be revoked. See 47 U.S.C. § 312(c); 47 C.F.R. § 1.91(a). That clearly has not been done.

11. The Commission obviously cannot transform this proceeding into a revocation case by way of a "clarification". Judge Steinberg expressly terminated the hearing proceeding on the issue of Mr. Easton's fitness, see *Westel* at 2, as he was required to do, see 47 C.F.R. § 1.92(c). To put Mr. Easton's license "directly at issue" now, the Commission must start a new proceeding.

12. The Bureau's argument that section 1.1209(d) of the Rules gives the Commission jurisdiction over Mr. Easton is not well taken. In the first place, a Commission rule cannot confer jurisdiction. Moreover, section 1.2109(d) provides only that "bidders" may be barred from future auctions. See 47 C.F.R. § 1.2109(d). It is perfectly obvious from the language of the section 1.2109 that the term "bidders" refers to "auction winners" or "winning bidder[s]".

See 47 C.F.R. § 1.2109(a)-(c). For example, only winning bidders "may be subject . . . to forfeiture of their upfront payment, down payments or full bid amount, and may be prohibited from participating in future auctions." 47 C.F.R. § 1.2109(d) (emphasis added). PCS 2000 was the winning bidder in this case, not Mr. Easton.

13. The Bureau claims that its investigation gave Mr. Easton the opportunity to "adjudicate" the issue of whether he had engaged in intentional misconduct. See Opposition at 9. The Commission, however, does not consider its investigations to be adjudications.^{3/} In any event, the Bureau's investigation cannot be considered an adjudication with respect to Mr. Easton's conduct because it did not lead to the issuance of any final order with determinative consequences to him. See *International Telephone and Telegraph Corp. v. Local 134, International Brotherhood of Electrical Workers*, 419 U.S. 428, 443-44 (1975).

14. If the Bureau's investigation was an adjudication, it obviously did not comport with any notion of due process. It suffices to note that the staff investigation was an *ad hoc* process conducted off-the-record on an *ex parte* basis.

15. The staff's investigation cannot be considered an adjudication for the reason that it did not, and could not, dispose of the question of whether Mr. Easton actually engaged in any intentional

^{3/} See *Inquiry into Alleged Abuses of the Commission's Auction Processes by Applicants for IVDS Licenses*, 9 FCC Rcd 6432 (1994); *Inquiry into Alleged Abuses of the Commission's Auction Processes by Applicants for Broadcast Facilities*, 4 FCC Rcd 6498 (1989); *John M. Roberts*, 3 FCC Rcd 371 (1988).

misconduct. In this regard, the Commission must reject the Bureau's fundamental claim that there was no need for an evidentiary hearing after it concluded its own investigation of Mr. Easton. See Opposition at 11. No claim could be more wrong.

16. Based on the Bureau's investigation, the Commission found that Mr. Easton intentionally misrepresented facts to the Commission in a telephone conversation on January 23, 1996. The Commission could make that finding if it had uncontested and uncontestable evidence that Mr. Easton made a false statement of fact "knowingly and with the intent to mislead the Commission." *RKO General, Inc. v. FCC*, 670 F.2d 215, 226 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). Even a cursory examination of the supplemented investigative "record" shows that there is no such evidence.

17. For example, the Commission found that "Mr. Easton contacted the Commission staff by telephone and claimed that the \$180 million bid was a Commission error." *PCS 2000 NAL*, 12 FCC Rcd at 1707. While the Commission stated that this telephone call was recorded, see *PCS 2000 NAL*, 12 FCC Rcd at 1707, the transcript of the recorded portion of the call does not show that Mr. Easton stated that the \$180 million bid was a Commission error. The only evidence that Mr. Easton made such a statement comes from Ms. Hamilton. She was the one who allegedly "overheard him say that the Commission's computer had caused an erroneous bid for the Norfolk market to be entered." Order at 7 (¶ 14). ^{4/}

^{4/} Ms. Milstein was also present but did not overhear the conversation. See Milstein Dep. at Tr. 19.

18. It is absolutely clear that the Commission's finding that Mr. Easton intentionally misrepresented facts was based on Ms. Hamilton's credibility. Even before the Bureau took her *ex parte* deposition, the Commission concluded that she was "credible". *PCS 2000 NAL*, 12 FCC Rcd at 1716 n.67. After she was deposed, the Commission pronounced Ms. Hamilton to be a "highly credible witness". *Order* at 17 (¶ 41). In contrast, Mr. Easton was discredited, despite the fact that he was not deposed or interviewed by the Bureau, simply because he had "plenty to lose and reason to dissemble". *PCS 2000 NAL*, 12 FCC Rcd at 1716 n.67.

19. We thought it was well-settled that questions of veracity and credibility should be resolved by an administrative law judge who can view the witnesses. *E.g., Tinker, Inc.*, 2 FCC 2d 978, 979-80 (1966). That is particularly true in cases of intentional misrepresentation, because issues of motive and intent require the "decision-maker to weigh witness credibility." *RKO General*, 670 F.2d at 225-26 (quoting *Nasem v. Brown*, 595 F.2d 801, 807 (D.C. Cir. 1979)). Indeed, the Commission recognized in this case that an administrative law judge should decide the "credibility of all the witnesses" including Mr. Easton. *Order* at 17 (¶ 41). Nevertheless, the Commission determined that Mr. Easton intentionally misrepresented facts *based on the credibility findings of its staff investigators*.

20. The Bureau's investigators did not produce uncontestable evidence essential to prove that Mr. Easton acted knowingly with an intent to deceive the Commission. The Bureau conspicuously failed

to prove that Mr. Easton even knew that he was talking with a member of the Commission's staff when Ms. Hamilton alleged he misrepresented facts. While she first claimed that Mr. Easton "phoned the FCC hotline (202-414-1260)", Hamilton Decl. at 3, Ms. Hamilton later testified that *she* dialed the FCC number, that a woman answered, that she heard that the call was being recorded, and that she then handed the phone to Mr. Easton. See Hamilton Dep. at Tr. 18-20. When counsel for the Bureau asked what she recalled Mr. Easton saying on the phone to the Commission, Ms. Hamilton testified, "The first person he talked to he was yelling at her saying it was the FCC's fault, that our computers did not make the error, that somehow the FCC's computer made the error, basically kept going on that point." *Id.* Tr. at 20.

21. According to Ms. Hamilton's uncorroborated testimony, Mr. Easton allegedly made the misrepresentation to an unidentified woman, who the Bureau cannot locate. See *Order* at 7 n.44. Moreover, the Commission has never claimed that the individual who first spoke with Mr. Easton was one of its employees. See *PCS 2000 NAL*, 12 FCC Rcd at 1707; *Order* at 7 n.44. For his part, Mr. Easton thought that the call was placed to the computer center hotline at the auction headquarters in the Postal Square Building, which he understood was staffed by an outside computer company.

22. There was no basis to conclude that Mr. Easton intended to deceive the Commission absent proof that he knew that he was speaking with a member of the Commission's professional staff. Mr. Easton could not have formed the requisite intent if he thought

he was speaking with a clerical employee or an employee of the contractor that staffed the auction center. Yet, the Bureau produced no proof on this element of its case, and the fact remains that Mr. Easton made no misrepresentations to Mr. Sigalos, who came on the line saying "This is Louis Sigalos, FCC, can I help you".

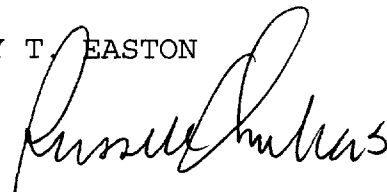
23. Finally, Mr. Easton submits that the Bureau was plainly wrong when it claimed that the Order provided Mr. Easton "with a full and complete hearing on the matter." Opposition at 10. Due process requires the Commission to designate the issues to be considered in a hearing, *see West Coast Media, Inc. v. FCC*, 695 F.2d 617, 619 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 816 (1983), and no issue was specified against Mr. Easton that would have given him the chance to tell his side of the story. One needs only compare the issue designated against Mr. Easton (Issue 1) with the misrepresentation/lack of candor issue designated against Mr. Breen (Issue 2(B)) to confirm that fact. *See Order* at 20 (¶ 53). Because no formal misrepresentation/lack of candor issue was specified in the Order, Judge Steinberg could not make the findings and conclusions that would clear Mr. Easton's name. *See Algreg Cellular Engineering*, 12 FCC Rcd 8148, 8169 (1997).

Respectfully submitted,

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October 24, 1997

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February 25, 1997

Thomas Gutierrez, Esq.
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Dear Tom:

I am writing to acknowledge receipt of your letter of February 14, 1997, in which you state that Mr. Anthony Easton "insists that PCS 2000 pursue all available avenues of relief" from the Notice of Apparent Liability for Forfeiture that the FCC issued on January 22, 1997. As your letter acknowledges, the Agency's action was based upon misrepresentations by your client and a separate proceeding will be conducted concerning "Mr. Easton's fitness to be a Commission licensee and his fitness to participate in future Commission proceedings." Notice of Apparent Liability for Forfeiture (the "NOAL") at ¶ 49.

Please be advised that on January 27, 1997, PCS 2000 paid to the FCC in full the \$1 million (\$1,000,000.00) specified in the NOAL as the amount to be forfeited by the company. As far as PCS 2000 is concerned, the NOAL proceeding is closed. Further, on behalf of PCS 2000, I am authorized to state that its decisions in this and related matters are all directed toward mitigating damages suffered by the company as a result of Mr. Easton's actions. In such respects, PCS 2000 must respectfully disagree with your assertion that a trial de novo in the U.S. District Court "will not impact in any way on the PCS 2000 license grant."

Sincerely,

Mike Senkowski

R. Michael Senkowski

cc: Fred Martinez
Richard Reiss

CERTIFICATE OF SERVICE

I, Katherine A. Baer, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 24th day of October, 1997, sent by first class United States mail, copies of the foregoing REPLY TO WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION TO PETITION FOR RECONSIDERATION to the following:

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